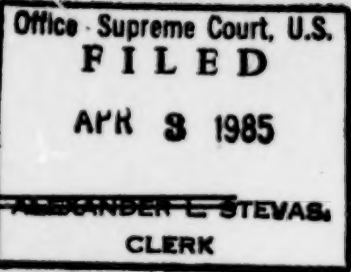


2
No. 84-1427



In The
Supreme Court of the United States

October Term, 1984

— o —
STEVEN D. SIMON,

Petitioner,

vs.

THE KROGER COMPANY and
GENERAL TEAMSTERS LOCAL 528,

Respondents.

— o —
**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

— o —
**RESPONDENT GENERAL TEAMSTERS LOCAL
528'S BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

— o —
FRANK B. SHUSTER
Counsel of Record
116 East Howard Avenue
Decatur, Georgia 30030
(404) 373-5515

*Attorney for General
Teamsters Local 528*

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

1712/8

QUESTIONS PRESENTED

Did the Eleventh Circuit correctly affirm the District Court's dismissal of Petitioner's hybrid breach of contract/breach of the duty of fair representation action based upon Petitioner's failure to satisfy the requirements of the applicable statute of limitations, 29 U.S.C. § 160(b) ?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	ii
Jurisdiction	1
Statement of the Case	2
a. The Relevant Facts	2
b. The Proceedings Below	3
Reasons for Denying the Writ	5
a. Summary of Argument	5
b. Argument	6
1. The Petition Does Not Present Special or Important Reasons Warranting Review	6
2. The Circuit Court Correctly Affirmed the District Court's Dismissal in that Petitioner Failed to Satisfy the Requirements of the Applicable Statute of Limitations	8
Conclusion	12

TABLE OF AUTHORITIES

A. CASES

<i>Caldwell v. Martin Marietta Corporation</i> , 632 F.2d 1184 (CA 5, 1980)	4, 10
<i>Del Costello v. International Brotherhood of Teamsters</i> , 462 U.S. 151 (1983)	3, 6, 7, 8, 9, 10
<i>Dunlap v. Lockheed-Georgia Company, et al.</i> , Case No. 84-8329 (CA 11, 1984)	2, 6

TABLE OF AUTHORITIES—Continued

	Page
<i>Howard v. Lockheed-Georgia Company, et al.</i> , 742 F.2d 612 (CA 11, 1984)	2, 6
<i>Lane & Bowler Corp. v. Western Well Works, Inc.</i> , 261 U.S. 387 (1972)	7
<i>Local Lodge 1424 International Association of Machinists v. National Labor Relations Board</i> , 362 U.S. 411 (1960)	9
<i>National Labor Relations Board v. Auto Warehouse, Inc.</i> , 571 F.2d 860 (CA 5, 1978)	9
<i>National Labor Relations Board v. Haskell Company</i> , 616 F.2d 136 (CA 6, 1980)	9
<i>National Labor Relations Board v. McCready & Sons, Inc.</i> , 482 F.2d 872 (CA 6, 1973)	9
<i>Rice v. Sioux City Memorial Park Cemetery, Inc.</i> , 349 U.S. 70 (1955)	7
<i>Simon v. The Kroger Company, et al.</i> , 743 F.2d 1544 (CA 11, 1984)	2, 6
<i>United States v. Matles</i> , 356 U.S. 256 (1958)	7, 11
 B. STATUTES, RULES AND REGULATIONS	
8 U.S.C. § 1451	11
29 U.S.C. § 160(b)	passim
29 U.S.C. § 185	8
Rule 4, Federal Rules of Civil Procedure	7
Rule 17, Supreme Court Rules	1, 6
Local Rule 91.2, United States District Court Northern District of Georgia	4
 C. TREATISES	
Moores Federal Practice (2nd Ed., 1983) § 3.04 at p. 3-21	11

No. 84-1427

In The
Supreme Court of the United States
October Term, 1984

STEVEN D. SIMON,
vs. *Petitioner,*

THE KROGER COMPANY and
GENERAL TEAMSTERS LOCAL 528,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT GENERAL TEAMSTERS LOCAL
528'S BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JURISDICTION

Respondent does not believe that any of the considerations under Rule 17 of the Supreme Court have been met.

The Circuits are not in conflict concerning the need for a Plaintiff, in a breach of contract/breach of duty of

fair representation action to satisfy both the filing and service requirements imposed upon such actions by 29 U.S.C. § 160(b). The Eleventh Circuit has consistently required complete compliance with the requirements of 29 U.S.C. § 160(b) in actions of this type, *Simon v. The Kroger Company, et al.*, 743 F.2d 1544 (CA 11, 1984); *Howard v. Lockheed-Georgia Company, et al.*, 742 F.2d 612 (CA 11, 1984); *Dunlap v. Lockheed-Georgia Company, et al.*, Case Number 84-8329 (CA 11, 1984), and no other circuit has taken a contrary view.

Moreover, the decision of the Eleventh Circuit in the instant case correctly applied the rulings of this Court and no important question of Federal law is presented by the Petition.

The instant petition does not present a question which warrants discretionary review.

STATEMENT OF THE CASE

I.

The Relevant Facts

Petitioner was employed by Respondent The Kroger Company (hereinafter referred to as "Respondent Company") from September 6, 1978 through February 18, 1982. On February 18, 1982, Petitioner was discharged from employment with Respondent Company. Thereafter, Petitioner filed a grievance protesting his discharge. Respondent General Teamsters Local 528 (hereinafter referred

to as "Respondent Union") processed this grievance and a grievance hearing was held on March 25, 1982. A decision denying Petitioner's grievance was issued and received by Petitioner no later than July 6, 1982 (R. 39, 40, 203, 204).

II.

The Proceedings Below

On January 3, 1983, Petitioner filed his complaint in the United States District Court for the Northern District of Georgia alleging that Respondent Union had breached the duty of fair representation owing to Petitioner and that Respondent Company had discharged Petitioner in violation of the applicable collective bargaining agreement (R. 2, 3). Respondent Company was served with a copy of the complaint on January 12, 1983 and Respondent Union was served with a copy of the complaint on January 26, 1983 (R. 10, 11, 12, 19).

On June 10, 1983, Respondent Company filed a Motion for Summary Judgment which was amended on July 5, 1983. Respondent Company asserted, pursuant to the Court's decision in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), that the applicable statute of limitations for an action such as this is the limitations period prescribed by Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). Respondent Company further contended that, inasmuch as Section 10(b) requires both filing and service of a complaint within six (6) months of accrual of the action to satisfy the limitations period, Petitioner's complaint was time barred in that the Complaint was not served within six (6) months

of the date the cause of action accrued to Petitioner (R. 30, 134).

Petitioner responded to the above-described motions on September 6, 1983 (R. 139). On September 28, 1983, the District Court held that the applicable limitations period was Section 10(b) of the National Labor Relations Act and, since Petitioner had not satisfied the service requirements of said Section within the time allowed therein, the action was barred. The District Court also held that Respondent Company's Motion was unopposed in that Petitioner, without explanation, had failed to respond to Respondent Company's Motion within the time allowed by Local Rule 91.2 (R. 157, 267).

Thereafter, Petitioner, relying upon *Caldwell v. Martin Marietta Corporation*, 632 F.2d 1184 (5th Cir., 1980) moved the District Court for reconsideration of its Order dismissing the complaint. On December 22, 1983, the District Court denied Petitioner's Motion for Reconsideration by holding that the general rule expressed in *Caldwell v. Martin Marietta, supra*, was not applicable to the instant case due to the specific statutory requirements of Section 10(b) and the special policy considerations which gave rise to those requirements (R. 25).

On October 24, 1983, Respondent Union filed a Motion for Summary Judgment asserting, *inter alia*, that the complaint was barred by the applicable limitations period (R. 173). Petitioner responded to this motion on November 23, 1983 (R. 254). On January 23, 1984, the District Court granted Respondent Union's Motion by holding that Petitioner had failed to satisfy the service requirement of Section 10(b), 29 U.S.C. § 160(b) (R. 271).

On February 24, 1984, Petitioner filed a Notice of Appeal, appealing the judgment of the District Court dismissing his complaint as to both Respondents. The United States Court of Appeals for the Eleventh Circuit affirmed the District Court's judgment on October 15, 1984 and denied Petitioner's Petition for Rehearing on December 6, 1984.

REASONS FOR DENYING THE WRIT

A.

Summary of Argument

(1) The decision of the Eleventh Circuit in the instant case correctly applied the requirements of 29 U.S.C. § 160(b) to cases of this type and is not in conflict with the decisions of any other circuit or this Court.

(2) The Petition does not present any special or important questions of Federal law warranting discretionary review.

(3) The requirement that a Plaintiff satisfy both the filing and service requirements of 29 U.S.C. § 160(b) in a hybrid breach of contract/breach of duty of fair representation lawsuit is consistent with the underlying policy considerations favoring relatively rapid resolution of labor disputes.

(4) The cases relied upon by Petitioner do not involve the specific statutory requirements found in 29 U.S.C. § 160(b) nor the special policy considerations underlying those requirements.

(5) When a Federal statute imposes additional requirements beyond mere filing in order to commence an action, mere filing without satisfying those additional prerequisites cannot toll the limitations period.

 o

B.

ARGUMENT

1. The Petition Does Not Present Special Or Important Reasons Warranting Review.

Rule 17 of the Court's Rules provides that a Petition for a Writ of Certiorari will only be granted where there are special and important reasons therefor. In the instant case, no such reasons exist.

Initially, there is no conflict among the Circuit Courts on the issue presented herein, and the one Circuit which has ruled on the issue has done so consistently, *Simon v. The Kroger Company, et al., supra*; *Howard v. Lockheed-Georgia Corporation, et al., supra*; *Dunlop v. Lockheed-Georgia Corporation, et al., supra*.

Furthermore, there has been no departure from a prior decision of this Court in the instant case. In *Del Costello v. International Brotherhood of Teamsters, supra*, the Court engrafted the six (6) month limitation period of 29 U.S.C. § 160(b) onto hybrid breach of contract/breach of duty of fair representation actions. However, a fair reading of *Del Costello* reveals that the Court was not presented with the issue of, and did not decide, whether the Plaintiff therein had satisfied the requirements of

29 U.S.C. § 160(b). The Eleventh Circuit's decision in the instant case is a logical extension of *Del Costello v. International Brotherhood of Teamsters, supra*, in that the Circuit Court required Plaintiff to satisfy the specific statutory requirements of 29 U.S.C. § 160(b) previously held by this Court to be applicable to actions of this type. A decision which, as discussed hereinafter, is consistent with the holdings in other cases involving Federal statutes which impose additional requirements beyond mere filing of a complaint in order to commence an action, *United States v. Metles*, 356 U.S. 256 (1958).

As this Court has stated several times, the Writ of Certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion between the Circuit Courts of Appeal, *Lane & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1922); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). No such situations are presented herein.

As to the special and important reasons for granting the Writ, the Court has stated that this implies a reach to problems beyond the academic or the episodic, *Rice v. Sioux City Memorial Park Cemetery, supra*, at 74. In light of amended Rule 4 of the Federal Rules of Civil Procedure, the Petition herein, at best, presents an episodic situation which does not warrant review.

In an effort to create conflicts between the Eleventh Circuit's holding herein and *Del Costello v. International Brotherhood of Teamsters, supra*, Petitioner asserts, without support or explanation, that the practical effect of the

Eleventh Circuit's decision herein will be to reduce the six (6) month limitation period applied to actions of this type to ninety (90) days. In reaching this conclusion, Petitioner further speculates, without any support in the record as to the facts of this case, that Defendants will avoid service of process. Such speculations do not warrant review by the Court.

2. The Circuit Court Correctly Affirmed The District Court's Dismissal In That Petitioner Failed To Satisfy The Service Requirement Of The Applicable Statute Of Limitations.

Is *Del Costello v. International Brotherhood of Teamsters, supra*, the Court held that the limitations period contained in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), governed hybrid breach of contract/breach of duty of fair representation actions brought against employers and Unions pursuant to 29 U.S.C. § 185. (The asserted basis for jurisdiction in the instant case.) In adopting this limitations period the Court noted that

The N.L.R.B. has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices (citations omitted). We have twice declined to decide the correctness of the Board's position, and we need not address that question today (footnote omitted). Even if not all breaches of duty are unfair labor practices, however, the family resemblance is undeniable and indeed there is substantial overlap.

Del Costello v. International Brotherhood of Teamsters, supra, at p. 2293.

Thus, noting the resemblance and overlap of district court actions alleging breach of the duty and breach of contract,

and an unfair labor practice charge raising the same allegation, the court adopted the limitations period found in 29 U.S.C. § 160(b) relative to unfair labor practices.

Not only did the Court note that the similarity of the rights asserted warranted adoption of the 10(b) limitations period, but the policy considerations favoring relatively rapid resolution of labor disputes also warranted adoption of the 10(b) requirements to an action such as the one herein, *Del Costello v. International Brotherhood of Teamsters, supra*, at p. 2292.

Section 10(b) expressly requires that a charge be both filed and served within six (6) months of the accrual of the action. As the District Court below noted, these requirements were imposed "to bar litigation over past events after records have been destroyed, witnesses have gone elsewhere and recollection of the events in questions have become dim and confused . . . and of course to stabilize existing bargaining relationships" citing *Local Lodge No. 1424 International Association of Machinists v. National Labor Relations Board*, 362 U.S. 411 (1960) (quoting H.R. Rep. No. 245, 80th Cong., 1st sess. 40 [1947]). As the District Court below went on to note these special considerations relative to labor relations would be ill served if a party could toll the 10(b) limitations period by mere filing. Indeed, it is for these very policy reasons that "strict adherence to the Section 10(b) limitation" has been required, *National Labor Relations Board v. Preston H. Haskell Company*, 616 F.2d 136, 142 (CA 5, 1980). See also, *National Labor Relations Board v. Auto Warehouse, Inc.*, 571 F.2d 860 (CA 5, 1978); *National Labor Relations Board v. McCready & Sons, Inc.*, 482 F.2d 877 (CA 6, 1973).

In this latter regard, it is submitted that reversal of the decision below would lead to the danger that parties in the industrial setting would be uncertain as to the length of time they must maintain records relative to each and every grievance processed. Pursuant to the express wording of Section 10(b) employers and unions now have the stabilizing influence of a specific six (6) month limitation period. Reversal of the decision below would undermine that stability by allowing a litigant to toll the limitations period by *mere* filing of a complaint within six (6) months of the accrual of the action.

Contrary to the foregoing, Petitioner contends that Section 10(b) was not intended to apply to judicial proceedings and that the service requirements only apply in the administrative proceedings conducted by the National Labor Relations Board. However, this argument ignores the undeniable "family resemblance" and "substantial overlap" between breaches of the duty of fair representation (raised by Petitioner's action) and unfair labor practices, *Del Costello v. International Brotherhood of Teamsters*, *supra*, at 2293. In light of this resemblance and overlap, the policy considerations requiring compliance with 29 U.S.C. § 160(b) are applicable regardless of the forum. To conclude otherwise would do little to foster the Federal policy favoring "the relatively rapid final resolution of labor disputes" *Del Costello v. International Brotherhood of Teamsters*, *supra*, at 2292.

In support of his Petition, Petitioner continues to rely upon the general rule expressed in *Caldwell v. Martin Marietta Corporation*, 632 F.2d 1184 (5th Cir., 1980), and similar cases, that the mere filing of a complaint tolls the running of the statutes of limitations in an action

based on Federal law. However, as noted by the District Court, that general rule governs only when the applicable statute of limitations requires that an action be "brought", "commenced", or "initiated" within a specified time. Unlike those cases, the instant statute required that the action be both filed (initiated, commenced) and *served* within the limitations period. In this regard, the cases relied upon by Petitioner do not involve express statutory requirements (or policy considerations) of the type involved herein.

The statute involved herein imposes very specific requirements for bringing the action. Requirements well rooted in the Federal policy relative to industrial stability. Where a Federal statute imposes additional requirements in order to commence an action, the filing of a complaint without satisfying those additional prerequisites cannot toll the limitations period, *Moore's Federal Practice* (2nd Ed. 1983) § 3.04 at pp. 3-12. For example, in *United States v. Matles*, *supra*, the government had failed to file the affidavit showing good cause required by 8 U.S.C. § 1451(a) in a denaturalization proceeding under the Immigration and Nationality Act. Although the complaint had been timely filed, the Court, rejecting the affidavit filed after the expiration of the statute of limitations, ruled that, "the affidavit must be filed with the complaint when the proceedings are instituted." As the affidavit was a statutory prerequisite to the proper commencement of an action, the failure to file a timely affidavit could not be cured by amendment, and the complaint was dismissed.

In the instant case, it cannot be denied that Petitioner failed to satisfy the service requirements of Section 10(b) and the Court below correctly dismissed the action.

CONCLUSION

On the basis of the foregoing the Petition for a Writ of Certiorari herein should be denied.

Respectfully submitted,

/s/ FRANK B. SHUSTER
Counsel of Record
116 East Howard Avenue
Decatur, Georgia 30030
(404) 373-5515
Attorney for Respondent
General Teamsters Local 528